GREENE BROILLET & WHEELER, LLP
LAWYERS
BROWNE GREENE, STATE BAR NO. 38441
ALAN VAN GELDER, STATE BAR NO. 221820
100 WILSHIRE BOULEVARD, SUITE 2100
P.O. BOX 2131
SANTA MONICA, CALIFORNIA 90407-2131
TEL. (310) 576-1200
FAX. (310) 576-1220

LAW OFFICES OF BRIAN D. WITZER, INC.
BRIAN D. WITZER, ESQ., STATE BAR NO. 123277
ANDREW J. SPEILBERGER, ESQ., STATE BAR NO. 120231
DANIEL BALABAN, ESQ., STATE BAR NO. 243652
WITZER LAW BUILDING
8752 HOLLOWAY DRIVE
WEST HOLLYWOOD, CALIFORNIA 90069-2327
TEL. (310) 777-5999
FAX. (310) 777-5988

Attorneys for Plaintiffs

(SPACE BELOW FOR FILING STAMP ONLY)

UNITED STATES DISTRICT COURT

NORTHERN DISTRICT OF CALIFORNIA

SAN FRANCISCO DIVISION

THOMAS B. GAINES, a deceased minor child by and through his personal representative(s) and/or successor(s) in interest; DIANA L. GAINES, individually, as Executor of the Estate of Thomas B. Gaines, and as Thomas B. Gaines' personal representative and successor in interest; GARY D. GAINES, as individually and as Thomas B. Gaines' personal representative and successor of interest; and THE ESTATE OF THOMAS B. GAINES,

Plaintiffs,

vs.

JOHNSON & JOHNSON, a New Jersey corporation; MCNEIL CONSUMER & SPECIALTY PHARMACEUTICALS, a Division of MCNEIL-PPC, INC., a New Jersey corporation; MCKESSON CORPORATION, a Delaware corporation; WAL-MART STORES, INC., a Delaware corporation; and DOES 1 through 100, inclusive,

Defendants.

CASE NO. 3:07-cv-05503.PJH
(formerly CGC -06-457600)

PLAINTIFFS' REPLY IN SUPPORT OF PLAINTIFF'S MOTION FOR REMAND; MEMORANDUM OF POINTS AND AUTHORITIES

Date: January 16, 2008
Time: 9:00 a.m
Location: Courtroom 3

Complaint Filed: November 3, 2006

TO THE COURT AND ALL PARTIES:

Plaintiffs hereby submit the following Reply in Support of Plaintiffs' Motion for Remand.

DATED: January 2, 2008

GREENE BROILLET & WHEELER, LLP

Browne Greene
Mark Quigley
Alan Van Gelder
Attorneys for Plaintiff

GREENE BROILLET & WHEELER, LLP
P.O. BOX 2131
SANTA MONICA, CA 90407-2131

MEMORANDUM OF POINTS AND AUTHORITIES

I. INTRODUCTION

Defendants' Opposition to Plaintiff's Motion to Remand only highlights the improper nature of Defendants' removal. Defendants offer no explanation for why they waited so long to attempt to remove and then provide no explanation for why they cannot show there is no possibility of success against McKesson. In fact the Opposition all but admits that there is a viable cause of action against McKesson, that McKesson is not a sham Defendant, and this matter belongs in State Court. Defendants state in their Opposition at Page 6:2-4, **"Children's Motrin [was] supplied by McKesson to Wal-Mart Store 1209 prior to 2004"** and that **"it might still have been on the shelf available for sale in March of 2004."** Yet Defendants then argue that there is something in the Declaration of Taylor that conclusively proves that it was impossible for Defendant McKesson to be liable for Plaintiff's death. As set out in Plaintiffs' Motion for Remand and below, Defendants Removal and their Opposition fell far short of the heavy burden it must overcome in arguing that McKesson is a sham Defendant.

II. DEFENDANTS FAIL TO REFUTE THE UNTIMELINESS OF THEIR NOTICE OF REMOVAL

Defendants argue that their Notice of Removal, filed on October 30, 2007, mere days before the one-year expiration of the time in which a case may be removed under Section 1446(b), was timely because Defendants were not on notice of the removability of the action until Defendants "received" a declaration from one of its employees on October 9, 2007. "Prior to receiving the Taylor Declaration, the case was not removable." (Defendants' Opp., p. 5.) However, Defendants' position is undermined by the fact that the "facts" Defendants rely upon and cite in support

GREENE BROILLET & WHEELER, LLP
P.O. BOX 2131
SANTA MONICA, CA 90407-2131

of removability consist of discovery responses that were disclosed *months prior to removal*. Defendants' position that they first became aware of the removability of the action when they "received" the declaration from their own employee is disingenuous.

Section 1446(b) provides that "a notice of removal may be filed within 30 days after receipt by the defendant, through service or otherwise, of a copy of an amended pleading, motion, order or other paper *from which it may first be ascertained* that the case is one which is or has become removable." 28 U.S.C. § 1446(b) (emphasis added). While Plaintiff continues to maintain that Defendants cannot "receive" their own employee's Declaration for purposes of Section 1446(b), as such an interpretation would be an improper manipulation of the statute, even assuming Defendants could rely on the Declaration Defendants' removal is nonetheless untimely. Defendants were on notice of the facts they now rely upon to support removal months prior to removal.

Since the beginning of this lawsuit, Defendants have argued that McKesson was not a proper defendant and have conducted discovery to try to support removal. Defendants even filed a Motion to Compel further discovery responses to obtain what they argued was necessary information as to whether McKesson is a proper party. (See Ex. B to the Pulliam Decl., Defendants' Memo of P's & A's in support of motion to compel, p. 3.) After Plaintiff produced further responses, Defendants took their Motion off calendar, presumably because they received the necessary information they were seeking. While no removal was filed based on these responses, Defendants now cite the responses in support of their claim that the action is removable. Similarly, Defendants repeatedly cite to discovery responses from Wal-Mart to McKesson, dated August 7, 2007, to support removability. (See Defendants' Opp., p. 9-10.) Again, no notice of removal was filed based on these responses.

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P.O. BOX 2131
SANTA MONICA, CA 90407-2131

"[T]he removal statutes were drafted to place upon removing defendants the *onus of acting swiftly* to ascertain the facts necessary to support removal." Enriquez v. FMC Corp., Airline Equip. Div. (D. Cal. 1992) 1992 U.S. Dist. LEXIS 13583, *6-7. Defendants were on notice of the facts they now claim support removability *for months prior to removal*. To accept Defendants argument that it did not "first ascertain" the removability of the action until receipt of their own employee's eleventh-hour declaration, would make a mockery of the spirit and purpose of Section 1446(b).

Moreover, missing from their Opposition is any explanation as to why it took Defendants eleven months to obtain this purportedly critical declaration from Defendants' own employee. As of February, 2007, when Plaintiffs produced discovery responses providing the specific address of the Wal-Mart where the Children's Motrin was purchased, Defendants were on notice of the specific store location and could then obtain the purportedly critical declaration. It is worth repeating that Defendants are all represented by the *same counsel* and *jointly defending* the action. It also cannot be ignored how close to the Summary Judgment deadline and trial date, Defendants waited before filing the removal.

As Defendants' Notice of Removal, filed days shy of the one-year expiration of time in which a defendant can remove an action was untimely, the matter should be remanded.

III. DEFENDANTS' REMOVAL FAILS TO MEET THE HEAVY BURDEN ASSOCIATED WITH FRAUDULENT JOINDER

Aside from being an untimely removal, and aside from being a meritless removal, **Defendants' own opposition to Plaintiff's remand dooms Defendants' efforts to improperly remove this case to Federal Court.**

The standard for determining whether a defendant has been fraudulently joined is not whether plaintiffs will actually or even probably prevail

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P.O. BOX 2131
SANTA MONICA, CA 90407-2131

on the merits, *but whether there is any possibility that they may do so.* Levine v. Allmerica Financial Life Ins. & Annuity Co. (C.D. Cal. 1999) 41 F.Supp. 2d 1077, 1078; see also Adams v. FedEx Corp. (D. Cal. 2005) 2005 U.S. Dist. LEXIS 40408 *7. A court determining whether joinder is fraudulent must examine whether there is any possibility that the plaintiff will be able to establish a cause of action against the party in question. Bellecci v. GTE Sprint Communs. Corp. (N.D. Cal. 2003) 2003 U.S. Dist. LEXIS 649, *9-10. There is a *strong presumption against a finding of fraudulent joinder*, and the removing defendant bears a heavy burden of persuasion to justify such a finding. Emrich v. Touche Ross & Co. (9th Cir. 1998) 846 F.2d 1190, 1193-1995. A defendant will be deemed to be fraudulently joined only if "after all disputed questions of fact and all ambiguities in the controlling state law are resolved in the plaintiff's favor, the plaintiff could not possibly recover against the party whose joinder is questioned." Id. (quoting Soo v. UPS (N.D. Cal. 1999) 73 F.Supp. 2d 1126, 1128). In finding a sham defendant, it should be "readily apparent" that the defendant was fraudulently joined. United Computer Systems, Inc. v. AT&T Corp. (9th Cir. 2002) 298 F.3d 756, 762.

On Page 5:26-6:4 of Defendants' Opposition papers Defendants make a series of stunning and inconsistent admissions regarding the culpability of McKesson in this litigation. Defendants state that at 6:2-4, "**Children's Motrin [was] supplied by McKesson to Wal-Mart Store 1209 prior to 2004**" and that "**it might still have been on the shelf available for sale in March of 2004.**" These statements and admissions by themselves demonstrate that Plaintiff has a probability of success against McKesson and that McKesson is not a sham Defendant. **Defendants' own Opposition puts McKesson Children's Motrin on the shelves of the Subject Walmart prior to the Plaintiffs' purchase of the Children's Motrin and fails to eliminate the possibility that such Children's Motrin was purchased by the Plaintiff.**

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P.O. BOX 2131
SANTA MONICA, CA 90407-2131

In fact, Defendants even acknowledge that absent the Taylor Declaration Defendants cannot conclude that "there was no possibility that Plaintiffs could establish a cause of action against McKesson." (Opposition Page 5:28-2.). In betting the "entire house" on the Taylor Declaration Defendants argue that "prior to receiving the Taylor Declaration, **the case was not removable**." Opposition 5:26. As such, Defendants' entire removal appears to now rest exclusively on the Taylor Declaration. However as discussed below and in Plaintiff's original motion the Taylor Declaration is woefully inadequate to support removal.

The Taylor Declaration does not meet the "no possibility of success standard" set out by Levine v. Allmerica Financial Life Ins. & Annuity Co. (C.D. Cal. 1999) 41 F.Supp. 2d 1077, 1078 et al. Defendants even acknowledge as much in their own motion writing that the Taylor declaration prevents Plaintiff from proving, "it was more likely than not that the Children's Motrin at issue came from McKesson.." (Opposition at 6:4-6). More likely than not, or fifty one percent is not enough to claim fraudulent joinder, Defendants through Taylor had to show "no possibility of success." Taylor's Declaration does not even come close.

In Plaintiffs Motion for Remand the Plaintiffs explained all of the things that were wrong with the Taylor Declaration and the McKesson interrogatory responses. Defendants' Opposition does nothing to address these problems.

The Declaration of Taylor comes up with the unsupported opinion that it is "extremely unlikely" that in March of 2004, McKesson Children's Motrin was on the shelves of the Subject Walmart. First, the standard for a sham Defendant is "no possibility." The nebulous term "extremely unlikely" chosen by the Defendants is not synonymous for impossible or no possibility. "Extremely unlikely" does not meet the standard of sham pleading. Secondly, it is telling that while Defense counsel argues in its papers that there is no possibility of success, Ms. Taylor refused to commit to such language under oath and under penalty of perjury. There

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P.O. BOX 2131
SANTA MONICA, CA 90407-2131

is a *strong presumption against a finding of fraudulent joinder*, and the removing defendant bears a heavy burden of persuasion to justify such a finding. Emrich v. Touche Ross & Co. (9th Cir. 1998) 846 F.2d 1190, 1193-1995. Arguing that there is no possibility of success was not enough, Defendants had to prove it, and Ms. Taylor does not provide the evidence Defendants need.

Even more fatal to the Taylor Declaration is the fact that it is limited to March of 2004. See Taylor Declaration at Paragraph 3. Ms. Taylor does not say that it is extremely unlikely that Children's Motrin purchased in February or January of 2004 did not come from McKesson. Plaintiffs' interrogatory responses indicate that they believed that the Children's Motrin responses were purchased **approximately** six months before Thomas Gaines' death. It is quite possible that the Children's Motrin could have been purchased in February 2004, January 2004, or even December 2003. NONE of the evidence submitted by the Defendants eliminates the possibility, or even makes it "extremely unlikely" that McKesson Motrin was not on the shelves in January 2004 or February 2004. (Defendants have already admitted that McKesson Children's Motrin was on the shelves in December of 2003).

Thus, even if Ms. Taylor's Declaration was admissible, which it is not, the Declaration is too narrow to support a sham pleading claim. Plaintiff objects to the Taylor Declaration in that no foundation is laid for Taylor to explain how or why she knows where the Children's Motrin came from and how long it lasts on the shelves. Ms. Taylor does not indicate how long on average Children Motrin products are on the shelves at her store, or what facts, documents, data, and experience, she relies on determining whatever this turn over rate is. Furthermore, she does not reveal if she in determining Children's Motrin turn over tracked McKesson vs. Non-McKesson turn over. Her inability to even conduct such calculations is why she cannot even state under penalty of perjury that there is no

GREENE BROILLET & WHEELER, LLP
P.O. BOX 2131
SANTA MONICA, CA 90407-2131

possible way McKesson Children's Motrin was on the shelves in March of 2004. The Declaration just amounts to a giant "maybe."

Neither the Taylor Declaration or the Defendants' discovery responses (which Defendants themselves claim were inadequate) state conclusively that McKesson was not involved in the distribution of Children's Motrin to Walmart and the Subject Walmart in 2004. There is NOTHING from McKesson that states that there is no possible way that Children's Motrin distributed by McKesson did not ultimately appear on the shelves in the Subject Walmart in 2004. Defendants' discovery responses and attached papers create an inference that Defendants are evasively answering the questions to create the false impression that McKesson had absolutely no involvement in the distribution chain of Children's Motrin to the Subject Walmart. Assuming for a moment that McKesson did not ship the Children's Motrin DIRECTLY to the Walmart at issue, NONE of the evidence provided by the Defendants indicates that McKesson was not a part of the distribution chain that brought the Motrin to the Walmart at issue. If McKesson provided the Motrin to an agent of Walmart or a third party for the ultimate purpose of providing it to the Walmart at issue, McKesson is still in the chain of distribution and still liable. It is quite telling that there is no Declaration form any McKesson employee that states there is no possible way that any Children's Motrin distributed by McKesson could have found its way on to a store shelf of the Subject Walmart in 2003 or 2004. Furthermore there is no Declaration from the entity that supposedly distributed the Children's Motrin to Walmart in place of McKesson. McNeil and Johnson and Johnson did not offer any evidence as to who in place of McKesson conclusively provided Motrin to the Subject Walmart. The Defendants have the burden of eliminating all doubt as to whether McKesson could have been responsible for the Children's Motrin. The evidence falls well short of the mark.

In Taylor's Declaration at Paragraph 2, she claims the Motrin in 2004 came from Johnson and Johnson. However there is no evidence produced by

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P.O. BOX 2131
SANTA MONICA, CA 90407-2131

Defendants that Defendant Johnson and Johnson actually makes and distributes Children's Motrin. (Which calls into question a portion of the Taylor Declaration). Attached as Exhibits 1 and 2 to the Declaration of Alan Van Gelder in Support of Plaintiff's Motion for Remand are printouts from Johnson and Johnson's own website. As set out by the website in Exhibit 1, Johnson and Johnson does not actually sell Children's Motrin, that responsibility is left to subsidiaries such as Defendant McNeil. As described in Exhibit 2, Johnson and Johnson leaves the actual selling to its subsidiaries as part of its system of decentralized management. In fact in other pending litigation, Johnson and Johnson and the VERY lawyers who filed Defendants Removal have argued that the selling and distribution of Children's Motrin is not handled by Johnson and Johnson. Such allegations call into question the validity of the Taylor Declaration.[1]

While the defendant seeking removal to federal court is entitled to present the facts showing the joinder to be fraudulent, merely showing that an action is likely to be dismissed as against the purported "sham" defendant does not demonstrate fraudulent joinder. Diaz v. Allstate Insurance Group (C.D. Cal. 1998) 185 F.R.D. 581, 586. Again, the standard is not whether plaintiffs will actually or even probably prevail on the merits, but whether there is *any possibility* that they may do so.

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[1]Plaintiff's Counsel currently also represents Sabrina Johnson in pending litigation in Los Angeles Superior Court Sabrina Johnson v. Johnson and Johnson et al. (TC018540). Sabrina much like Thomas was also severely injured by Children's Motrin. The Court recently denied Defendants' Motion for Summary Judgment finding triable issues of fact concerning the role Children's Motrin had in injuring Sabrina Johnson. Defense Counsel in this matter is also Defense Counsel in the Sabrina Johnson matter. The very Defense Counsel in this case has repeatedly claimed, argued, and represented during discovery disputes and meet and confers that Defendant Johnson and Johnson does not directly make, sell, or distribute Children's Motrin and knows little to nothing about the actual process. Such arguments and representations call into question the validity, foundation, and meaning of Ms. Taylor's statements regarding the origin of the Children's Motrin. (See Declaration of Alan Van Gelder in Support of Motion to Remand).

GREENE BROILLET & WHEELER, LLP
P.O. BOX 2131
SANTA MONICA, CA 90407-2131

IV. CONCLUSION

For the above reasons, Plaintiffs Motion for Remand should be granted and this matter should be remanded back to State Court.

DATED: January 2, 2008

GREENE BROILLET & WHEELER, LLP

Browne Greene
Mark Quigley
Alan Van Gelder
Attorneys for Plaintiff

GREENE BROILLET & WHEELER, LLP
P.O. BOX 2131
SANTA MONICA, CA 90407-2131

PROOF OF SERVICE
(C.C.P. 1013A, 2015.5)

STATE OF CALIFORNIA

I am employed in the county of Los Angeles, State of California. I am over the age of eighteen years and not a party to the within action; my business address is 100 Wilshire Boulevard, 21st Floor, Santa Monica, California 90401.

OnJanuary 2, 2008, I served the foregoing document, described as

PLAINTIFFS' REPLY IN SUPPORT OF PLAINTIFF'S MOTION FOR REMAND; MEMORANDUM OF POINTS AND AUTHORITIES

on the interested parties in this action

___ by placing the true copies thereof enclosed in sealed envelopes addressed as stated on the attached mailing list.

___ by placing ___ the original ___ a true copy enclosed in sealed envelopes addressed as follows:

___ BY MAIL.

___ I deposited such envelope in the mail at Santa Monica, California. The envelope was mailed with postage thereon fully prepaid.

___ As follows: I am "readily familiar" with the firm's practice of collection and processing correspondence for mailing. Under that practice it would be deposited with U.S. postal service on that same day with postage thereon fully prepaid at Santa Monica, California in the ordinary course of business. I am aware that on motion of the party served, service is presumed invalid if postal cancellation date or postage meter date is more than one day after date of deposit for mailing in affidavit.

Executed on **January 2, 2008,** at Santa Monica, California.

_X_ BY PERSONAL SERVICE. I delivered such envelope by hand to the offices of the addressee.

__X__BY ELECTRONIC MAIL to the addressee as set forth on the attached mailing list

___ BY FACSIMILE. I faxed a copy of the above-described document to the interested parties as set forth [above/on the attached mailing list].

Executed on **January 2, 2008,** at Santa Monica, California.

_X_ (Federal) I declare under penalty of perjury under the laws of the State of California that the above is true and correct.

Michelle Leslie
Name

Signature

SERVICE LIST
GAINES V. JOHNSON & JOHNSON
Case No. CGC 06 457600

BY PERSONAL SERVICE
Charles E. Preuss, Esq.
Thomas W. Pulliam, Jr., Esq.
Cheryl A. Jorgensen, Esq.
Vernon Zvoleff, Esq.
DRINKER BIDDLE & REATH, LLP
50 Fremont St., 20th Fl.
San Francisco, CA 94105
(415) 591-7558
Fax: (415) 591-7510

Attorneys for Defendants **McNEIL CONSUMER HEALTHCARE, a division of McNEIL-PPC, INC. (erroneously sued as Mc NEIL CONSUMER AND SPECIALTY PHARMACEUTICALS, a Division of McNEIL-PPC, INC.) McKESSON CORPORATION, and WAL-MART STORES, INC.**

BY EMAIL
Brian D. Witzer, Esq.
Daniel Balaban, Esq.
LAW OFFICES OF BRIAN D. WITZER, INC.
Witzer Law Building
8752 Holloway Drive
West Hollywood, CA 90069
Tel: (310) 777-5999
Fax: (310) 777-5988

Attorneys for Plaintiffs
ESTATE OF THOMAS B. GAINES
DIANA L. GAINES
GARY D. GAINES